UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NESTLÉ PURINA PETCARE COMPANY,

Employer,

and

Case No. 14-RC-145222
Regional Director Daniel L. Hubbel

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1, AFL-CIO,

Petitioner.

NESTLÉ PURINA PETCARE COMPANY'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

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INTRODUCTION

The unit sought by IBEW Local 1 (the "Union") and approved by the Regional Director in this case is extremely and inappropriately narrow—the three maintenance employees at the Employer's Support Center facility at 5100 Columbia Avenue, St. Louis, Missouri. The Support Center facility is unique within the Nestlé Purina organization worldwide as it includes a machine shop, foundry, welding, assembly, warehouse and R&D operation and is dedicated solely to the development of unique, proprietary equipment and parts for the Employer's exclusive use in its manufacturing facilities around the world. As such, the Support Center creates trade secrets and other intellectual property for the Employer. The Support Center currently employs 55 hourly employees that are required by the Employer to be "100 percent engaged and work together as one team." (Tr. 30[1]) Through the "Nestlé Continuous Excellence" initiative implemented at the Support Center, the Employer emphasizes to employees that "if everyone is not working together as a team, the business will not be successful, and the operation will not succeed." (Tr. 42) The Employer makes "very clear" to all Support Center employees that working together with each other as "one team" is a requirement, and that this working together approach is "a huge part" of the ability of this unique operation to either succeed or fail. (Tr. 30)

In the context of this unique, team-based business, the Union's laser shot approach to attempt to organize a micro-unit of three maintenance employees is inappropriate. The Union's approach disenfranchises the other hourly employees who work together with these maintenance employees in an integrated and interdependent manner, as members of the one

[1] Supporting testimony from the hearing conducted on February 10, 2015 will be cited in this brief by reference to the page number of the transcript where that supporting testimony appears, as follows: ("Tr. __").

team. All the employees on this one team work in the same facility, under the leadership of the same person, Plant Manager Dwight Howdeshell. All employees receive similar wages and the very same wage enhancements, retirement, health care and other fringe benefits. And all employees are subject to a long list of identical terms and conditions of employment such as identical rules of conduct, attendance requirements, leave policies, and much more. The employees even share work duties—the three maintenance employees perform maintenance tasks that prior to their hiring last year were done by the other employees, and some of which are still performed by the other employees. While there are a few tasks the maintenance employees alone perform, the differences between them and the other employees is dwarfed by the many terms and conditions of employment that they all share in common. Accordingly, all should be permitted to vote on the issue of whether a union represents them in this one-team workplace.

Apparently the only reason the Union seeks to exclude the other hourly employees from a unit is that its ability to organize the employees extends only to these three maintenance employees, and it has no sufficient showing of interest from any others. But it is illegal for the "extent of organization" to be a dominant consideration in the determination of an appropriate unit. Thus, the Board should reject the micro-unit sought here out of respect for the legal right of the rest of the "one team" of hourly employees to decide whether or not to be represented.

The Regional Director approved this improperly narrow unit in a decision issued on February 23, 2015. The Employer now requests that the Board review and set aside the Regional Director's Decision and Direction of Election.

FACTS

1. The Parties And Their Collective Bargaining Relationship

The employer, Nestlé Purina Petcare Co. (the "Employer" or "Purina"), operates a machine shop-type facility at 5100 Columbia Avenue, St. Louis, MO 63139 that is known as the Support Center. (Tr. 14) The Employer meets the jurisdictional standards of the Board. (Board Ex. 2, #6)

The petitioning union, International Brotherhood of Electrical Workers, Local 1 (the "Union"), is a labor organization within the meaning of the Act. (Board Ex. 2, #3) It initially petitioned for a bargaining unit consisting of only two employees of the 55 hourly employees at the Support Center. (Tr. 20) The two employees are David Mertzlufft and Tim Williams. (Tr. 27) The Union described the narrow unit it sought in terms that expressly exclude all the other employees:

> **Included:** All full time and regular part-time maintenance electricians employed by the Employer at its facility at 5100 Columbia Avenue, St. Louis, MO.
>
> **Excluded:** Office clerical and professional employees, guards and supervisors as defined in the Act, ***and all other employees***.

(Board Ex. 1a, emphasis supplied) During the hearing, the Union amended its petition to request inclusion in the unit of a third person, the working lead man of the maintenance employees, Andrew Wenk. (Tr. 253)

2. Description of the Employer's Operations

a. The History and Operations of the Support Center Facility

Purina is a global supplier of pet food that manufactures dry and wet pet food for dogs and cats, as well as kitty litter, in some 47 manufacturing facilities around the world. (Tr. 15-16) The Support Center facility at issue in this case is unique within Purina, and even within

its parent company, Nestlé S.A. (Tr. 16) The Support Center develops and produces proprietary equipment and parts for the exclusive use of Purina facilities worldwide. (Tr. 16, 17-18) The work and work product of the Support Center are considered by the Employer to be trade secrets, and as such the Support Center is among the most secured sites in the company. (Tr. 17) Site access is severely restricted, and everything there is done under the protection of "intellectual property confidentiality agreements." (Tr. 17)

The Support Center has been in operation for 33 years, initially supporting only Purina factories in North America. (Tr. 19) Three years ago the Employer decided to expand its operations to support factories globally, and this decision launched the Support Center in to a period of rapid change and growth. (Tr. 19) In just the last three years, the Support Center has doubled its workforce and tripled its sales and distribution. (Tr. 19) Currently the workforce consists of 19 salaried employees and 55 hourly employees. (Tr. 20)

The various operations in the Support Center include design services, corporate engineering, and plant-floor operations consisting of assembly, machining, R&D, warehouse, foundry, welding, and painting. (Tr. 20) Those various operations are interdependent and integrated. The undisputed testimony of the Plant Manager confirmed "There is not a single operation within the site that can function independently of one another. They all service one another in some form or fashion…they all function together as an entity." (Tr. 20)

b. **The Physical Plant**

The Support Center facility is one building with 67,000 square feet of floor space. (Tr. 21, 22) The security features of the facility apply to all the employees in the same manner. All employees are entrusted with a photo ID badge that serves as a security access card. (Tr. 22)

c. **Common Facilities Used by All Hourly Factory Employees**

The Support Center has a single parking lot shared by all employees. (Tr. 21) The facility has one entrance, used by all employees, and a common break room and same-sex locker facilities shared by all employees. (Tr. 21)

d. **Organization of the Facility Management**

Howdeshell, as Plant Manager, manages all of the individual groups within the Support Center, including design and production functions. (Tr. 15) Some of the hourly employees are directly supervised by the Shop Supervisor, Tyler Simpson, who in turn reports to Howdeshell. (Tr. 129) This includes machining, foundry, welding, assembly, warehouse and painting employees. (Tr. 129) Currently Howdeshell has retained the maintenance employees under his direct supervision as he uses his own expertise to develop the maintenance function, but these maintenance employees will also be transferred to the supervision and leadership of Shop Supervisor Simpson when Howdeshell concludes that the maintenance function is operating properly in a sustained manner. (Tr. 133) When that planned transfer occurs, the reporting structure for the maintenance employees will not only be similar to that of many other hourly employees as it is currently, but it will soon be exactly the same.

e. **Operational Philosophy Applied at the Support Center**

Howdeshell testified without contradiction by the Union that the Employer makes "very clear" to all Support Center employees that they are required to "work together as one team." (Tr. 30) The Employer integrates the work of the employees through a very specific business strategy known as "Nestlé Continuous Excellence" ("NCE"). (Tr. 38) Per NCE, a three-year operational master plan is implemented through certain measured objectives that are cascaded down through levels of the organization to the shop floor so that all employees integrate and focus their work efforts in the most efficient way to implement the NCE objectives.

(Tr. 38) Communications between employees are routine and strategically structured in the NCE process. (Tr. 39) These include structured shift handover meetings, and daily, weekly, monthly and quarterly operational review meetings. (Tr. 39-40)

The Employer trains every employee on its NCE process. In the training the Employer emphasizes the "ONE-TEAM approach." (Tr. 41-43; Emp. Ex. 3)

The Support Center also utilizes designated "Areas of Responsibility" ("AOR"). (Tr. 31) Teams of employees define and agree on their AOR, and these are outlined on a factory diagram and posted for all employees to understand. (Tr. 32) An AOR diagram was admitted into evidence as Employer Exhibit 2, and explained by Howdeshell at pages 33-35 of the transcript. Within an AOR, the employees working there have responsibility for safety, sanitation and maintenance of all machinery within that work space. (Tr. 31-32)

3. **The Hourly Maintenance Employees**

When Howdeshell came to the Support Center in 2012, there were no designated "maintenance" employees on site. (Tr. 43) All the maintenance tasks in the facility were performed by the employees within the site, supplemented by outside contractors. (Tr. 43) Howdeshell hired Wenk to oversee the contractors and to do some building maintenance. (Tr. 43-44) As the business grew, Howdeshell saw an opportunity to increase efficiencies in the operation by freeing operators from some of the maintenance tasks they performed on their equipment, and he hired Mertzlufft about seven months ago "to supplement the maintenance tasks the operators were already doing." (Tr. 44) This maintenance support was designed to free up more time for the operators to machine, assemble, weld, paint and cast parts in the foundry. (Tr. 44) Approximately one month ago, Howdeshell hired Williams for the same purpose, to further support the operators. (Tr. 44)

With the new maintenance employees in place, the maintenance tasks are being shared between them and other hourly employees. Currently, the maintenance employees perform approximately 2/3 of planned maintenance tasks ("PMs"), with the remaining 1/3 still being completed by the other hourly employees. (Tr. 45) In addition, the operators continue to perform the "autonomous maintenance" tasks needed on the equipment within their particular AOR. (Tr. 45)[2]

Unlike the machinists, assemblers, welders, foundry workers, painters and warehouse workers, the maintenance employees do not have their own specific AOR. Rather, their work area of responsibility consists of the AOR of the other hourly employees. (Tr. 36) Howdeshell testified about the types of work tasks the maintenance employees perform in the other employees' AORs. (Tr. 34-36) Maintenance employee Mertzlufft testified about he walks around the entire shop floor every shift to learn of the other employees' needs for maintenance support in their AORs. (Tr. 231-232) In fact, Mertzlufft confirmed that he spends a majority of his work time on the shop floor the AORs of the other hourly employees. (Tr. 235-236)

The Employer requires all hourly employees to be capable of performing some maintenance tasks. (Tr. 46) This is even reflected in several of the position descriptions for other hourly positions. For example, the descriptions for the machinist and assembler positions confirm that machinists and assemblers are expressly required to:

> 6. Assist and report to maintenance personnel on PMs or any issues of equipment.
>
> 7. Maintain and keep machines in good working order along with keeping proper fluid levels.

[2] The court reporter apparently misunderstood Howdeshell's words and transcribed "economist maintenance" when Howdeshell said "autonomous maintenance." (Tr. 45; see Tr. 47 for the description of autonomous maintenance)

> 8. Use and care of all equipment, measuring instruments and/or tools assigned.

(Emp. Ex. 8 – machinist position description; Emp. Ex. 9 – assembler position description) Similarly, the foundry workers' position description confirms that they too must be "knowledgeable in preventive maintenance measures and procedures." (Emp. Ex. 11 – foundry helper position description) Additionally, the painter positions are responsible for "Maintaining all equipment and performing PMs within their area of responsibilities." (Emp. Ex. 13 – position description for screw finisher/painter/sandblaster job)

Howdeshell also explained in his testimony how some maintenance tasks are completed by the operator and a maintenance employee working in tandem. (Tr. 46-48)

> Many times the individuals [hourly employees]…are assisting maintenance in completing the tasks to get the tasks done in a faster period of time. This is common practice. (Tr. 48)

Not only do maintenance employees assist operators to complete maintenance tasks, but other employees assist the maintenance employees in the performance of their job duties. Welders commonly assist maintenance employees to build a bracket or to fabricate other parts they need. (Tr. 48) Also, machinist employees make parts needed by the maintenance employees. (Tr. 48) The point is that the "one team" requirement of working together in a functionally integrated manner is real and critical to the success or failure of the Support Center.

The integration of the maintenance position with the other hourly positions is reflected in the maintenance position description.[3] It confirms that a maintenance employee

[3] The position description lists as the position title "Electrical Maintenance Mechanic." (Emp. Ex. 4) Howdeshell explained that this title is applied by the Employer's recruiters, who strategically use particular titles to attract a crowd of applicants from a deeper talent-pool. (Tr. 52-53) In this regard, the word "electrical" in the job title helped recruit for the position, but Howdeshell explained that in practice electrical duties are a small part of the job. (*See* Tr. 55—explaining that only 10% of the job entails electrical work.)

"must work well with others" and will "interface with Team Leads…and hourly positions." (Emp. Exs. 4, 5) Furthermore, it confirms that the maintenance employees must have working relationships with "hourly workers and salaried positions at NPSC." (Emp. Exs. 4, 5)

The Union seems to claim that the maintenance employees are craft electricians, but this is an exaggeration in light of the work they are required to perform. It is true that the employees at issue had an electrical background, but that is not why they were hired. The Employer selected persons for these positions based on mechanical aptitude, targeting those with a machining background with experience in either machine shops or in maintenance. (Tr. 49) Williams, for example, highlighted at the outset of his resume his description of himself as a "Talented Machinist with seven years' experience setting up and operating a variety of machine tools." (Union Ex. 5)

Electrical experience was not a requirement for these maintenance jobs, mainly because the Employer has been satisfied contracting out the electrical work at the Support Center to a contractor called Kaemmerlen Electric. (Tr. 49) The maintenance employees are "electrically qualified" in the Employer's parlance. (Tr. 50) This means that they get some additional electrical safety training beyond that received by all employees annually (Tr. 50), and therefore can do some troubleshooting work and simple electrical work like resetting of breakers. (Tr. 51) But more substantial electrical work is contracted out to Kaemmerlen. (Tr. 52)[4]

Howdeshell testified that only 10% of the work of the maintenance employees involves any electrical task. (Tr. 55) Mertzlufft estimated it was 30%. (Tr. 240-241) Either way, it is undisputedly true that the simple electrical work performed by these maintenance

[4] Howdeshell expects to spend nearly a million dollars on electrical work contracted out this year. (Tr. 50) The Director may take notice of the publicly-known fact that Kaemmerlen's employees are represented by the Union.

employees is a minority of their overall job, and therefore they certainly are not employed as craft electricians.

4. **Overlap In Wage Rates and Identical Bonuses and Wage Enhancements**

Employer Exhibit 7 shows that the wages for hourly employees in the Support Center and demonstrates that the wages of the two maintenance employees fall in the middle of the wage range. Hourly wages range from $15.85 to $35.82, with the two maintenance employees paid at an hourly rate of $27.68. (Emp. Ex. 7) This is very close to the weighted average wage for the facility of $26.47/hr.

The Employer supplements the base wage rates with a shift differential that is equally available to all hourly positions in the facility. (Tr. 69; Emp. Ex. 3, HR-E-005) The Employer also supplements the pay of all hourly employees with overtime pay more generous than that required by state or federal wage laws. (Emp. Ex. 6, HR-E-003) This too is the same for all hourly employees.

The Employer also offers an annual performance incentive bonus (of up to 5% of pay) to the hourly employees at the Support Center. (Tr. 70) The bonus is based on overall business performance, and all hourly employees receive the same level of bonus regardless of their individual performance or contribution. (Tr. 71-72) The across-the-board bonus that all employees share, or not, as the case may be, demonstrates the integrated "One Team" approach infused in the work environment and process at the Support Center.

5. **Employee Benefits Common To All Hourly Employees**

The maintenance employees in the petitioned-for unit and the other hourly employees in the Support Center all enjoy a generous list of benefits that are the same for all. Among other things, this includes identical:

- Comprehensive medical benefits program

- Dental insurance benefits
- Health Savings Accounts
- Vacation
- Holiday pay
- Funeral leave
- Parental leave
- Sickness and Accident paid time off
- 401(k) matching contributions
- Nestlé pension plan
- Tuition reimbursement/educational assistance
- Employee Assistance Program

(Emp. Ex. 6; Tr. 66)

6. **Key Employee Policies Common To All Hourly Employees**

Not only are the all the pay and benefits for the maintenance employees the same as those of other hourly employees, but all of the other terms and conditions of employment are substantially identical as well. For example, all of the policies described in the Employee Handbook apply equally to all hourly employees. (Tr. 66) This includes a variety of the fundamental policies that dictate the basic terms and conditions of employment, such as:

- Rules of Conduct
- Attendance Policy
- Confidentiality Policy
- Conflict of Interest Policy
- EEO: No discrimination, and no harassment policies
- Safety Rules
- Search Policy

- Drugs and Alcohol in the Workplace Policy
- Weapons and Firearms Policy
- Dress code and Uniform Policy
- Personal Protective Equipment
- Layoff and Recall Policy
- Pay and Timekeeping Procedures

(Emp. Ex. 6[5])

7. **Other Common Terms and Conditions**

The maintenance employees typically work a schedule consisting of five 8-hour days, Monday through Friday, commencing at either 5:00 a.m. or 7:00 a.m. (Tr. 63) This is the same schedule worked by many other hourly employees. (Tr. 62)

The maintenance employees receive performance evaluations in a process that is identical to the process used to evaluate the performance of the other hourly employees. (Tr. 65)

8. **Procedural History**

On January 28, 2015, the Union filed a petition to unionize just two maintenance employees in the Support Center. Nestlé objected to the scope of the unit as improperly narrow, contending that all hourly employees shared a community of interest requiring them to be part of the same unit. Alternatively, Nestlé argued that a subset of employees including machinists, painters, and assemblers were required to be in the same unit as the maintenance employees.

Following preliminary discussions, the Union conceded that a third employee – a maintenance lead employee – was required to be a part of the bargaining unit. But the Union rejected joining any other employees to the unit.

[5] All employees receive the same new-hire orientation which includes a page-by-page review of the uniform personnel policies in the employee handbook. (Tr. 65)

After a hearing, Nestlé and the Union filed post-hearing briefs. On February 23, the Regional Director rejected Nestlé's arguments and held that the three-person unit proposed by the Union was an appropriate bargaining unit. In reaching his conclusion, the Regional Director applied the "overwhelming community of interest standard" as directed by *Specialty Healthcare and Rehabilitation Center of Mobile,* 357 NLRB No. 83 (2011).

ISSUES FOR REVIEW

Under the Board's Rules, it shall grant requests for review of a regional director's decision "where compelling reasons exist therefor." 29 C.F.R. § 102.67(c). In this case, the Employer respectfully requests that the Board grant review and reverse the Regional Director's because:

1. There are compelling reasons for the Board to reevaluate the portion of its decision in *Specialty Healthcare* requiring parties challenging proposed units to show an overwhelming community of interest between employees included in and excluded from the unit. The Board's *Specialty Healthcare* decision is contrary to the NLRA and departed from prior precedent without reasoned explanation, and its adoption violated the Administrative Procedure Act.

2. The Regional Director's Decision departs from Board precedent by applying *Specialty Healthcare* despite the presence of prior bargaining activity between the Employer and the Union. The Regional Director's factual finding that the Employer submitted no evidence of prior representation outside the craft was clearly erroneous.

3. Even if the Board reaffirms the vitality of the *Specialty Healthcare* rule and its application under the facts of this case, the Regional Director's factual finding that there was no overwhelming community of interest between the petitioned-for unit and employees outside the unit was clearly erroneous.

ARGUMENT

I. THE BOARD SHOULD REEVALUATE THAT PORTION OF ITS DECISION IN *SPECIALTY HEALTHCARE* REQUIRING PARTIES CHALLENGING A UNION'S PROPOSED BARGAINING UNIT TO SHOW THAT EMPLOYEES EXCLUDED FROM THE PROPOSED UNIT SHARE AN "OVERWHELMING COMMUNITY OF INTEREST" WITH EMPLOYEES IN THE UNIT.

A. The Board's Adoption of the Overwhelming-Community-of-Interest Test in *Specialty Healthcare* Violates the National Labor Relations Act.

The Board's adoption of its new standard for unit determinations in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), violates the National Labor Relations Act and therefore should not be applied in this case. In *Specialty Healthcare*, the Board concluded that a union's petitioned-for unit will be appropriate unless the employer proves that employees excluded from the unit share "an overwhelming community of interest" with the employees in the proposed unit. *Id.* at 12-13. Unless this "overwhelming" standard is met, the proposed unit will be deemed appropriate, as long as the employees in the proposed unit share a minimal set of interests. *Id.* at 12.

Specialty Healthcare represents the Board's second attempt to implement its so-called "overwhelming-community-of-interest" test when determining whether a petitioned-for unit (*i.e.*, the particular bargaining unit sought by a union) is appropriate. The first time that the Board tried to implement this test, twenty years ago, it was decisively rejected. In *NLRB v. Lundy Packing Co.*, 68 F.3d 1577 (4th Cir. 1995), the Fourth Circuit Court of Appeals recognized that the Board's attempt to put such a thumb on the scales in favor of a union's petitioned-for bargaining unit (1) violated the express command of the Act by giving controlling weight to the extent of union organization; and (2) represented a wholesale reversal of decades of Board precedent on the determination of appropriate units without a reasoned explanation. Nothing has changed in the twenty years since *Lundy* that would render the "overwhelming-

community-of-interest" test lawful. The "overwhelming community of interest" standard cannot be enforced.

1. ***Lundy Packing***.

In *Lundy*, two unions sought to represent a unit of production-and-maintenance employees in an employer's facility.[6] The employer argued that the unions' proposed unit was too narrow and that only a wall-to-wall unit of all the eligible employees in the facility would be appropriate. Specifically, the employer sought to add, among other workers, electricians, quality control employees, industrial engineers, and lab technicians to the unit. The Board ultimately determined that the union's proposed unit, after some additions by the Regional Director, was appropriate. In reaching its conclusion, the Board determined that the excluded employees at issue "do not share such an *overwhelming community of interest* with the petitioned-for production and maintenance employees as to mandate their inclusion in the unit." *Lundy Packing Co.*, 314 NLRB 1042, 1043 (1994) (emphasis added). The decision provoked a sharp dissent, which took issue with the adoption and application of the "overwhelming" test. *See id.* at 1046 (Member Stephens, dissenting). The dissent noted that Board precedent did not support the use of the "overwhelming" test and that the new test "derogated the Board's policy against fragmenting production and maintenance units." *Id.*

The court of appeals denied the Board's petition for enforcement of its order, holding that the Board "both contravened its own announced standards and accorded controlling weight to the extent of union organization at Lundy, thereby violating § 9(c)(5) of the National Labor Relations Act." *Lundy*, 68 F.3d at 1579. The court began by noting that the "composition

[6] Note that the unit proposed by the *petitioning unions* in *Lundy* was significantly broader than the unit proposed here. In other words, the Union's proposed unit in this case is *even narrower* than the unit deemed too narrow in *Lundy*.

of a bargaining unit is significant." *Id.* Though unit determination is a matter for the Board's discretion, "[n]onetheless the Board must operate within statutory parameters." *Id.* at 1580. One of those parameters is that the Board cannot allow the extent of union organization to be the controlling or "dominant" factor in making the unit determination. *Id.* By presuming that the union-proposed unit is appropriate absent an "overwhelming community of interest" with excluded employees, the Board violated this rule. *Id.* at 1581. Given that "the union will propose the unit it has organized," the presumption that a union's unit is appropriate gives the organized unit de facto controlling weight, in violation of § 9(c)(5) of the Act. *Id.* Moreover, by adopting the "overwhelming" standard without providing a reasoned explanation for doing so, its decision was not entitled to deference. *Id.* at 1583 ("While the Board may choose to depart from established policy, it must explicitly announce the change and its reasons for the change." (internal quotation marks omitted)). As the court concluded: "The deference owed the Board as the primary guardian of the bargaining process is well established. It will not extend, however, to the point where the boundaries of the Act are plainly breached." *Id.*

Rather than remand the case to the Board, the Fourth Circuit simply denied enforcement of the Board's order and terminated the case. *Id.*; *see also NLRB v. Lundy Packing Co.*, 81 F.3d 25, 26-27 (4th Cir. 1996) (rejecting Board's attempt to reinstate proceedings following court's initial decision and "reiterat[ing] our earlier order that enforcement of the Board's bargaining order is denied and that this case is closed in all respects.").

2. ***Specialty Healthcare***.

In *Specialty Healthcare*, a union petitioned the Board to represent a unit of certified nursing assistants (CNAs) in a non-acute care nursing home. 357 NLRB No. 83, at 1. The employer argued that the unit should also include the other service and maintenance employees in the facility. *Id.* at 3. The issue in the case turned on the particular rules applied to

the health-care industry. Despite the narrow issue presented in the case and the unique rules applied to health-care facilities, the Board took the opportunity to rewrite the entire body of labor law on the appropriateness of bargaining units. Though neither party had asked the Board to address issues beyond the scope of the facts of the case, the Board majority decided to do just that, ordering the parties and inviting amici to address eight different questions regarding the appropriate scope of a bargaining unit. *Id.* at 1. As relevant here, the Board asked the parties to address issues of general application outside the health-care context, including:

> Where there is no history of collective bargaining, should the Board hold that a unit of all employees performing the same job at a single facility is presumptively appropriate in non-acute health care facilities. Should such a unit be presumptively appropriate as a general matter. . . .
>
> Should the Board find a proposed unit appropriate if, as found in *American Cyanamid Co.*, 131 NLRB 909, 910 (1961), the employees in the proposed unit are "readily identifiable as a group whose similarity of function and skills create a community of interest."

Id.

The Board's holding in *Specialty Healthcare* was divided in two parts. First, it overruled its prior decision in *Park Manor Care Center*, 305 NLRB 872 (1991), which had created a pragmatic community of interest tests to determine whether a proposed unit is appropriate in non-acute health care facilities. 357 NLRB No. 83 at 4-8. The Board purported to "return to traditional community-of-interest considerations in determining if a proposed unit is an appropriate unit in non-acute health care facilities." *Id.* at 8. By its very terms, this holding was limited to the non-acute health care industry.

The Board's second holding, however, dramatically reshaped the law on appropriate bargaining units across all industries. Purporting to "make clear" the law, *see id.* at 12, the Board actually created a completely new test to determine when a proposed unit is

appropriate. According to the Board, the analysis begins by looking solely at the unit proposed by the union and not considering any employees outside that unit. *Id.* "If that unit is an appropriate unit, the Board proceeds no further." *Id.* A unit is appropriate if the employees share a "community of interest." *Id.* at 9. If that low standard is met, the analysis concludes unless the employer argues that "a proposed unit consisting of employees readily identifiable as a group who share a community of interest is nevertheless *not* an appropriate unit because the smallest appropriate unit contains additional employees." *Id.* at 10 (emphasis in original). In that case, the employer is required to make "a showing that the included and excluded employees share an *overwhelming community of interest*." *Id.* at 11 (emphasis added). The only example given by the Board of employees who share an "overwhelming" community of interest is two employees with the same title; a bargaining unit including one of the employees but excluding the other would be an inappropriate fractured unit. *Id.* at 13. Member Hayes dissented from the Board's order, arguing that the "decision fundamentally changes the standard for determining whether a petitioned-for unit is appropriate in any industry subject to the Board's jurisdiction." *Id.* at 15 (Member Hayes, dissenting).

Specialty Healthcare was enforced by the Sixth Circuit Court of Appeals under the name *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013). But despite the fact that both parties and *amici* on both sides cited *Lundy Packing* in their respective briefs, the Sixth Circuit completely ignored the case. The opinion did not even discuss *Lundy Packing*, much less try to distinguish it. The employer did not petition the Supreme Court for a writ of certiorari.

3. The Overwhelming-Community-of-Interest Test Violates the National Labor Relations Act by Giving Controlling Weight to the Extent of Union Organization.

Just as in *Lundy*, an explicit proscription in the Act was plainly ignored here. The Act provides that "[i]n determining whether a unit is appropriate for the purposes [of collective bargaining,] the extent to which the employees have organized shall not be controlling." 29 U.S.C. § 159(c)(5) ("§ 9(c)(5)"). As the *Lundy* court noted, § 9(c)(5) was enacted as part of the Taft-Hartley Act in 1947 in response to a perception that the Board was abdicating its responsibility under the Act by choosing units supported on the basis of extent of organization. 68 F.3d at 1580. Prior to Taft-Hartley, the Board regularly issued "decisions where the unit determined could only be supported on the basis of the extent of organization." *NLRB v. Metro Ins. Co.*, 380 U.S. 438, 441 (1965). As a result, Congress amended the law so that the Board could consider "the extent of organization" as just one factor among many when determining whether a proposed unit was appropriate. *Id.* at 442.

Through the Taft-Hartley Act, Congress confirmed that the Board was to protect employees' free choice about whether to allow a union in to their workplace, and not merely be a partisan champion of unions (or of employers for that matter). For example, Taft-Hartley "emphasized that employees 'have the right to refrain from any or all' § 7 activities," (i.e., the right to join a union or engage in concerted activity) in addition to the right to engage in such activities. *See Chamber of Commerce v. Brown*, 554 U.S. 60, 67 (2008) (quoting 29 U.S.C. § 157). In other words, Taft-Hartley "provided equal protection for the employee's right *not* to join a union as for the right to support a union." *NLRB v. Action Automotive, Inc.*, 469 U.S. 490, 500 (1985) (Stevens, J., dissenting) (emphasis in original). Likewise, Taft-Hartley "added § 8(b), which prohibits unfair labor practices by unions," *Brown*, 554 U.S. at 67 (citing 29 U.S.C. § 158(b)), made it unlawful for supervisors to organize and support unions, *NLRB v. Ky. River.*

Cmty. Care, 532 U.S. 706, 718 (2001), and prohibited "closed shop" agreements requiring employers to hire only union members, *Commc'ns Workers of Am. v. Beck*, 487 U.S. 735, 747-49 (1993). It is against this backdrop that the meaning of § 9(c)(5) must be considered.

To deal with the limitations imposed by §9(c)(5), the Board developed the "community of interest" test. *Lundy*, 68 F.3d at 1580. Under that test, the Board would review "[s]everal criteria, *no one of which was more dominant than another* [in order to] determine whether employees shared a community of interest sufficient to form an appropriate unit." *Id.* (emphasis added). By examining twelve separate factors bearing on the unit determination decision, the Board ensured that the extent of organization would not be the controlling factor. *Id.*

Under §9(c)(5), the Board cannot use extent of organization as either the exclusive, controlling, or dominant factor in determining the appropriateness of a unit. *Lundy Packing*, 68 F.3d at 1580; *Arcadian Shores, Inc. v. NLRB*, 580 F.2d 118, 120 (4th Cir. 1978). The overwhelming-community-of-interest test violates § 9(c)(5) of the Act by "accord[ing] controlling weight to the extent of union organization." *See Lundy Packing*, 68 F.3d at 1581.

The "overwhelming" test turns the traditional community of interest test on its head. Instead of using a range of factors to determine whether a proposed unit is appropriate, as the Board did with its traditional test, the overwhelming test skews the analysis "overwhelmingly" in favor of the union-proposed unit, to the detriment of the preferences of the other employees. Instead of considering twelve factors, "no one of which [is] more dominant than another," *id.* at 1580, the Board begins by considering only one factor: extent of organization. As long as the petitioning union is savvy enough not to petition for a manifestly fractured unit (*i.e.*, a unit including some employees with a particular title but excluding other

employees with that same title), the unit requested will be deemed appropriate. This was the concern identified in *Lundy*, and the Board's renewed attempt to adopt this standard does nothing to assuage that concern.

To be sure, the Board has argued that its new "overwhelming community of interest" test is "vastly and crucially different" than its old "overwhelming community of interest" test that was rejected in *Lundy*. *Specialty Healthcare*, 357 NLRB No. 83, at 11 n.25. This claim cannot be sustained. To reach this conclusion, the Board first contorts its *Lundy* decision and then contorts the Fourth Circuit's rejection of *Lundy*. First, the Board claims that *Specialty Healthcare* is different than *Lundy* because the "new" standard requires a showing that "employees in the petitioned-for unit must be readily identifiable as a group and the Board must find that they share a community of interest using the traditional criteria before the Board applies the overwhelming-community-of-interest standard to the proposed larger group." *Id.* According to the Board, it was the lack of this initial factual finding in *Lundy* that led the Fourth Circuit to reject it. *Id.* (claiming that the Board's decision in *Lundy* "had applied the correct legal standard . . . but had not first made the necessary findings" to support that standard).

This is demonstrably false. The "necessary findings" that the Board says were missing in *Lundy* were present on the face of the facts of the case. Production-and-maintenance units, like the one sought in *Lundy*, were "readily identifiable" on their face and shared a "community of interest" based on the Board's longstanding precedent. Indeed, the Board's history of recognizing production-and-maintenance units in manufacturing facilities goes back to its earliest days of the Board. *See U.S. Stamping Co.*, 1 NLRB 123, 128 (1936).[7]

[7] This was just the eighth decision ever issued by the Board.

Similarly, there is zero indication in the *Lundy* decision that it turned on the absence of some threshold factual finding. Nowhere in the opinion does the court suggest that its concern was that the production-and-maintenance unit proposed in that case was not "readily identifiable" or lacked a "community of interest." To the contrary, the court was clear that the problem with the "overwhelming" test is that it relied too heavily on the unit proposed by the union, in direct violation of the careful balancing Congress established in § 9(c)(5). *Lundy*, 68 F.3d at 1581.

Thus, the Board's attempts to distinguish the test applied in *Specialty Healthcare* from the test rejected by *Lundy* are unpersuasive.[8] The Board's application of the overwhelming-community-of-interest test so skewed the analysis in favor of the Union's petitioned-for unit that it made the extent of organization the controlling or dominant factor in its decision. Doing so violated § 9(c)(5) of the Act.[9]

B. The Board Failed to Provide a Reasoned Explanation for its Departure from Prior Board Decisions When Adopting the Overwhelming-Community-of-Interest Test.

In addition to giving controlling weight to the extent of union organization, the Board's overwhelming-community-of-interest test is fatally flawed for other reasons as well.

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[8] The Board's interpretation of a judicial decision is not entitled to any deference. *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618, 642 n.11 (2007).

[9] In addition, the Board's decision in *Specialty Healthcare* abdicated its responsibilities under § 9(b) of the Act, which provides that "[t]he Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising *the rights guaranteed by this subchapter*, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . . ." 29 U.S.C. § 159(b) (emphasis added). One of those rights, enshrined since 1947, is the right to refrain from collective bargaining and union organization. 29 U.S.C. § 157. By crediting so heavily the petitioned-for unit, the Board's decision effectively denies the rights of those who would choose to refrain from collective bargaining.

Key among them is the Board's failure to provide a reasoned explanation for its adoption of the "overwhelming" test and the inevitable repudiation of more than forty years of precedent that flowed from the new test. Far from providing a reasoned explanation for its decision, the Board fails to even acknowledge that *Specialty Healthcare* changed the law, instead insisting that it merely clarified the law. This is false.

1. An Agency Is Required to Provide a Reasoned Explanation to Support a Departure from Prior Precedent.

Where an agency, including the Board, repudiates its prior law, it needs to provide a reasoned explanation for doing so. *J.P. Stevens & Co., Inc. v. NLRB*, 623 F.2d 322, 329 (4th Cir. 1980) ("The Board may change its policies. Indeed, it has a duty to alter them to respond to new circumstances. When it deviates from its precedents, however, it must make a reasoned explanation for the change."); *LeMoyne-Owen Coll. v. NLRB*, 357 F.3d 55, 60 (D.C. Cir. 2004) (Roberts, J.); *see FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("An agency may not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books."). Without an explanation, a court has no way to determine why the agency departed from its prior holding and, therefore, whether the agency exercised its discretion properly. *LeMoyne-Owen*, 357 F.3d at 61; *see also Lundy*, 68 F.3d at 1583 ("While the Board may choose to depart from established policy, it must explicitly announce the change and its reasons for the change." (internal quotation marks omitted)). The purpose of the reasoned explanation requirement is "so that the reviewing court may understand the basis of the agency's action and so may judge the consistency of that action with the agency's mandate." *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973) (plurality opinion). Courts are entitled—indeed, required—to test the adequacy of an agency's justification for changing its policy. Where the justification is found lacking, the decision must be rejected. *See, e.g.*,

Americare Pine Lodge Nursing & Rehab. Ctr. v. NLRB, 164 F.3d 867, 876 (4th Cir. 1999) ("[I]t is well settled that this Court will not accept the Board's departure from its standing interpretation of the Act without a reasonable explanation.").

2. *Specialty Healthcare* Changed Board Law on Unit Determinations.

The Board undoubtedly explained its decision to overrule *Park Manor* and adopt a new standard for unit determination in the health care industry. Whatever the merits of that decision, the Board's opinion gives courts a fair opportunity to review it and understand the Board's rationale. The same cannot be said for the adoption of the "overwhelming" test. The Board argues that it is merely clarifying the law, rather than changing it. If this claim is false, by definition the Board has failed to reasonably and adequately explain the change.

a. The Board's Support for its Prior Use of the "Overwhelming" Test in Specialty Healthcare *Is Almost Non-Existent.*

In *Specialty Healthcare*, the Board began by acknowledging that "different words have been used to describe" the employer's burden to show that a proposed unit is too small. 357 NLRB No. 83, at 11. The Board then cited all the case law it could muster in support of the "overwhelming" test. It was able to cite just two cases over the previous twenty years that used the phrase "overwhelming community of interest" outside of the accretion context. *Id.* One of those two cases was *Lundy*, where the test was rejected and where the court acknowledged that the "overwhelming" test was an unsupported change in the law.

In the other case, it was *the employer*, not the Board, who argued that a group of employees shared an overwhelming community of interest: "*the employer* argued that the Lang-supplied carpenters and helpers shared such an overwhelming community of interests with the solely-employed carpenters and helpers that a unit excluding the former employees would be inappropriate." *Laneco Constr. Sys., Inc.*, 339 NLRB 1048, 1049 (2003); *see also id.* at 1050

("[W]e reject *the Employer's argument* that the Lang-supplied carpenters and helpers shared such an overwhelming community of interests . . . ." (emphasis added)). Nowhere in *Laneco* does the Board endorse that standard or conclude that employers *must* show an "overwhelming" community of interest to defeat a proposed unit. Thus, there is zero basis for the Board to argue that the "overwhelming community of interest" had support in the law prior to *Specialty Healthcare*.

The Board's use of *Lundy* in *Specialty Healthcare* reveals the extent of the Board's faulty analysis and the impropriety of its new "overwhelming" test. On one hand, given the paucity of precedent using the "overwhelming" test that could justify the Board's claim that it is merely clarifying the law, the Board must have felt compelled to cite *Lundy*. On the other hand, recognizing that *Lundy* denied enforcement of the test, the Board also must have felt compelled to distinguish *Lundy*. As noted above (*see* Section III.C., *supra*), the Board did so in forceful terms: "[T]he rule disapproved by the court in *Lundy* . . . is *vastly and crucially different* from the standard we apply here." *Id.* at 11 n.25 (emphasis added). But if the *Lundy* standard is "vastly and crucially different" from the *Specialty Healthcare* standard, query how can *Lundy* also be used as support for the proposition that "[t]he Board has articulated the *same standard*." *Id.* at 11. In one paragraph, the *Lundy* standard is both the "same standard" as the *Specialty Healthcare* standard and "vastly and crucially different" than *Specialty Healthcare*. Such superficiality and inconsistency alone justifies a determination that *Specialty Healthcare* lacks the reasoned analysis required to discard prior precedent.

b. The Mechanics of the Test Articulated in Specialty Healthcare *Are Inconsistent with the Board's Prior Standard.*

Moreover, comparing the standard created in *Specialty Healthcare* to the standard used prior to the decision demonstrates the dramatic changes brought about by the

"overwhelming" test. Prior to *Specialty Healthcare*, the Board's community-of-interest test involved a comparison between the petitioned-for employees and those outside the unit to determine whether the former group was "sufficiently distinct" to warrant separate bargaining. At no point under the traditional test did the Board look solely at the petitioned-for unit:

> *The Board's inquiry into the issue of appropriate units, even in a non-health care industrial setting, never addresses, solely and in isolation, the question whether the employees in the unit sought have interests in common with one another.* Numerous groups of employees fairly can be said to possess employment conditions or interests "in common." Our inquiry—though perhaps not articulated in every case—necessarily proceeds to a further determination whether the interests of the group sought are sufficiently distinct from those of other employees to warrant the establishment of a separate unit.

Newton-Wellesley Hosp., 250 NLRB 409, 411 (1980) (emphasis added). This standard has been reaffirmed countless times in a nonpartisan manner by Boards of all political stripes. *See, e.g.*, *AGI Klearfold, LLC*, 350 NLRB 538, 541 (2007); *Publix Super Mkts., Inc.*, 343 NLRB 1023, 1024 (2004); *Home Depot USA, Inc.*, 331 NLRB 1289, 1291 (2000); *Seaboard Marine, Ltd.*, 327 NLRB 556, 556 (1999); *C&K Mkt., Inc.*, 319 NLRB 724, 726 (1995); *Transerv Sys., Inc.*, 311 NLRB 766, 767 (1993); *P.S. Elliott Servs., Inc.*, 300 NLRB 1161, 1162 (1990); *New England Tel. Co.*, 280 NLRB 162, 164 (1986); *Barbara George, Inc.*, 273 NLRB 1239, 1240 (1984); *Purnell's Pride, Inc.*, 265 NLRB 1190, 1190 (1982); *Print-O-Stat, Inc.*, 247 NLRB 272, 273 (1980); *Atl. Richfield Co.*, 231 NLRB 31, 32 (1977); *Norrwock Shoe*, 209 NLRB 843, 843 (1974); *Harrah's Club*, 187 NLRB 810, 812-13 (1971); *United Foods, Inc.*, 174 NLRB 91, 91 (1969).

Thus, prior to *Specialty Healthcare*, it was settled law that the Board did not look solely at the petitioned-for unit when determining whether that unit was appropriate. Yet, *Specialty Healthcare* mandates this precise test. 357 NLRB No. 83, at 8 ("Procedurally, the

Board examines the petitioned-for unit first. If that unit is an appropriate unit, the Board proceeds no further."). The Board's silence on this precedent confirms that there is no legitimate way to square its newly skewed test with precedent.

c. The Specialty Healthcare *Test Is Inconsistent with Prior Results in Maintenance Unit Cases.*

Likewise, the Board's approach to manufacturing cases prior to the adoption of the *Specialty Healthcare* test establishes just how different the current standard is from the prior standard. A long line of Board cases requires production-and-maintenance units even where a union seeks to represent only maintenance employees. In those cases, the Board often acknowledged the considerable differences between production and maintenance employees in a particular workplace. Despite the differences, the Board nevertheless has regularly held that requested maintenance-only units were inappropriate. The Board's decisions in these cases, overlooking differences in two groups of employees and holding that separate units would be inappropriate, cannot be squared with the "overwhelming-community-of-interest" standard. In other words, had these past cases been reviewed under the *Specialty Healthcare* standard, their outcomes would have been different. As a result, the standard announced in *Specialty Healthcare* cannot be considered to be merely clarifying.

For example, in *Peterson/Puritan, Inc.*, 240 NLRB 1051 (1979), a union sought to represent a unit of mechanics. In favor of this separate unit, the union pointed to several key distinctions between the production and maintenance employees:

> The mechanics are paid a higher average wage than the production line employees, wear a distinct uniform, and report to work one-half hour before each production shift begins. Also, the mechanics are under the exclusive supervision of the line mechanics supervisor, who reports directly to the plant engineer.

Id. at 1051. Despite these differences, the Board concluded that a separate maintenance unit would be inappropriate. In doing so, the Board did not claim that the production and maintenance employees shared an "overwhelming community of interest." Rather, it made a much more modest finding: because "the mechanics work close to, and share common benefits with, production workers, perform duties which are an integral part of the production process, and do not possess a high level of skills, we find that a unit limited to line mechanics is inappropriate." *Id.*[10] These relatively modest similarities cannot support a conclusion that the two groups of employees shared an "overwhelming community of interest"; yet the Board nevertheless rejected the union's petition for a separate unit. *See also Buckhorn, Inc.*, 343 NLRB 201 (2004) (requiring combined production-and-maintenance unit despite higher wages, different skills, different departments, and different training for maintenance employees);[11] *TDK Ferrites Corp.*, 342 NLRB 1006 (2004) (separate maintenance unit inappropriate despite maintenance employees having higher skill, higher average wage, and different training and aptitude requirements than production workers); *F&M Schaefer Brewing Co.*, 198 NLRB 323 (1972) (separate maintenance unit inappropriate despite higher wages, different job tasks, and different uniforms). In none of these cases did the Board require an overwhelming community of interest

[10] Here too, the maintenance workers maintain equipment and machines in the production areas, and work side by side with other hourly employees. And, they share identical benefits.

[11] Whereas there was a wage "gap" in *Buckhorn,* there is no such gap in this case. In *Buckhorn*, the maintenance employees earned between $12.25 and $18.25 per hour, while the production employees earned between $10.25 and $12.75 per hour. *See id.* at 202 n.5. In the present case, the two maintenance employees earn $27.68 per hour, while the other hourly employees earn between $15.85 and $35.82 per hour. (Emp. Ex. 7) (The maintenance lead man is paid at the top of this scale.) In *Buckhorn*, the Board relied on the overlap in wages as evidence that a maintenance-only unit was inappropriate. *See id.* Here, the wages for the majority of the maintenance employees are even more common with the wages of the other hourly employees than was the case in *Buckhorn*.

between the employees that the unions sought to exclude and the employees in the proposed unit, nor could the Board have made such a showing in light of the differences between the groups in each case.

In short, the outcomes of the Board's prior precedents are wildly inconsistent with the notion that employers must show an "overwhelming community of interest" between employees in a proposed unit and employees excluded from that unit. In those cases, much more modest findings were sufficient to require a larger unit than the union proposed. Because the Board's new test would unquestionably lead to different outcomes in these cases, it cannot be considered a mere clarification of the law.

d. Prior to Specialty Healthcare*, "Overwhelming Community of Interest" Was Relevant Only to Accretion Cases.*

As the *Lundy* court noted, the "overwhelming" test has been used in the past, but in a completely different context. 68 F.3d at 1581. The test was developed in "accretion" cases, where a party seeks to add employees to an already existing bargaining unit without giving the potential new members an opportunity to vote on whether or not to join the union. *See Safeway Stores*, 256 NLRB 918, 918 (1981) (accretion appropriate "when the additional employees share an overwhelming community of interest with the preexisting unit to which they are accredited"). In such cases, it makes sense to require a very strong showing of similar interests, because certain employees are being denied the opportunity to even vote on whether they should join a particular union. In order "to assure to employees the fullest freedom in exercising" their rights under the Act, *see* 29 U.S.C. § 159(b), employees should be denied a vote only when they are virtually identical to employees already in the bargaining unit, such that continuing to exclude them is irrational or arbitrary. Requiring such a showing as a precondition for the disenfranchisement of employees is entirely rational. It makes no sense, however, to apply the

same standard when what is being sought is the exact opposite—the enfranchisement of employees. That a standard once reserved for the narrow and unique circumstances of accretion has become the general standard in all unit petitions demonstrates that the Board is not clarifying—but rather rewriting—labor law.

e. *Because the Board Did Not Adequately Explain its Departure from Prior Precedent in* Specialty Healthcare*, its Decision Is an Abuse of Discretion*.

It is axiomatic that one cannot explain a departure when one denies the departure's very existence. This is precisely what the Board has done here with the adoption of its "overwhelming-community-of-interest" test. In looking exclusively at the petitioned-for unit and adopting the overwhelming-community-of-interest test, *Specialty Healthcare* does not clarify the long tradition outlined above; it overrules every single case in that line. *See id.* at 18 (Hayes, dissenting) ("The majority purports to apply 'traditional community-of-interest' principles in making unit determinations for non-acute health care facilities. However, their definition of these principles is far from traditional and will have the intended dramatically different results in appropriate unit determinations for all industries."). Because *Specialty Healthcare* overruled a long line of cases, rather than simply clarifying those cases' meaning, the Board was required to develop an adequate, reasoned explanation for its decision. *Lundy*, 68 F.3d at 1583; *LeMoyne-Owen Coll.*, 357 F.3d at 60; *J.P. Stevens*, 623 F.2d at 329. Because the Board failed to do so, the overwhelming-community-of-interest test cannot be given legal effect.[12]

[12] The majority of the academic literature addressing this issue also agrees that the Board has changed its standards, rather than merely clarifying them. *See* Zev J. Eigen & Sandro Garofalo, *Less Is More: A Case for Structural Reform of the National Labor Relations Board*, 98 Minn. L. Rev. 1879, 1890 (2014) ("[I]n the highly controversial Specialty Healthcare & Rehabilitation Center decision, the Board *radically changed* its historical 'community of interest'

C. The Adoption of the Overwhelming-Community-of-Interest Test Violated the Administrative Procedure Act.

Further, the test adopted in *Specialty Healthcare* violated jurisprudential norms by reaching out beyond the facts of the case and adopting a rule of general application that neither party requested. Because the Board wanted to proceed via adjudication to decide an issue, it was incumbent upon it to wait until it had a case in which the issue was ripe for decision. Otherwise, as set forth below, it was obligated to proceed via rulemaking. Further, the quasi-rulemaking that the Board attempted through the solicitation of amicus briefs in *Specialty Healthcare* did not comply with the Administrative Procedure Act ("APA").

The decision to proceed via rulemaking or adjudication rests with the Board in the first instance. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 293 (1974). Still, there is a limit on the Board's discretion. *Id.* at 294. Establishing rules of broad-scale, general application that conflict with prior precedents must be done via rulemaking, where the strictures of the Administrative Procedure Act govern the process. *See Ford Motor Co. v. FTC*, 673 F.2d 1008, 1009 (9th Cir. 1981) ("[A]n agency must proceed by rulemaking if it seeks to change the law and establish rules of widespread application."); *Specialty Healthcare*, 357 NLRB No. 83, at 15 (Hayes, dissenting) ("[T]he majority is overstepping the bounds of its discretion in making sweeping changes to established law through this adjudication, without adhering to any

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standard for determining the scope of appropriate bargaining units." (emphasis added)); Tanja J. Thompson & Brenda N. Canale, *Has* Specialty Healthcare *Changed the Landscape in Organizing and Representation Proceedings?*, 29 ABA J. Lab. & Employment L. 447, 450 (2014) ("In truth, however, *Specialty Healthcare* did not 'clarify' an old standard for election cases; rather, it created a new standard--one that establishes a virtually impossible hurdle for employers to overcome."); Edward Phillips, *The Law at Work: New NLRB 'Quickie Election' Procedures*, 48 Tenn. B.J. 30, 31 (2012) ("In *Specialty Healthcare*, the NLRB reversed two decades of board law, changing the standard for determining the appropriateness of a bargaining unit."); *but see* William H. Haller, *Tempest in a Bedpan? The* Specialty Healthcare *Controversy*, 29 ABA J. Lab. & Employment L. 465 (2014).

approximation of a rulemaking procedure that would comply with requirements under the Administrative Procedures Act (APA) designed to safeguard the process by ensuring scrutiny and broad-based review."); *cf. N.C. ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291, 305 (4th Cir. 2010) ("[T]he general nature of rulemaking enables uniform application across industries, lessens the likelihood of distortions caused by the influence of individualized facts in cases, and also makes the resulting rules readily accessible in a single location."); *Nueces Cnty. Navigation Dist. No 1 v. Interstate Commerce Comm'n*, 674 F.2d 1055, 1065 (5th Cir. 1982) ("[R]ulemaking was particularly appropriate . . . to consider the adoption of a new standard of common control that would transcend the interests of the particular petitioners . . . ."). Promulgating such rules via adjudication is an abuse of discretion. *Pfaff v. U.S. HUD*, 88 F.3d 739, 748 (9th Cir. 1996).

Here, the Board exceeded the reasonable boundaries of the adjudicative process and abused its discretion. The Board took a case ostensibly about the presumptions regarding bargaining units in non-acute health care facilities and used it as a vehicle for rewriting the rules for bargaining units in all workplaces, despite neither party requesting such a broad overhaul of the law. In doing so, it overruled fifty years of precedent in another substantive area of law without an acknowledgement that it was doing so.

The present case demonstrates the wide-ranging effects of the Board's supposed clarification of the law. The seminal Board decision in determining the appropriateness of separate maintenance units is *American Cyanamid Co.*, 131 NLRB 909 (1961), released more than fifty years ago. There the Board held that it would "examine on a case-by-case basis the appropriateness of separate maintenance department units." *Id.* at 912. Since then, decisions in countless cases involving myriad fact patterns have created a large body of law in this area. Over time, in the American common-law legal tradition, both employers and unions have relied

on this body of law in making decisions on how to structure the workplace and in determining what types of bargaining unit to petition and represent. And yet the Board saw fit to attempt to eradicate the entire body in a separate case that had nothing to do with production and maintenance employees (or even the manufacturing industry in general). It is no longer clear what circumstances constitute sufficient integration of production and maintenance employees to justify denial of a separate maintenance unit. This was a dramatic shift in the law that required an opportunity for notice and comment in the absence of a case presenting an appropriate factual context.[13]

While the Board is free to develop its law via adjudication, there are consequences for doing so. It must wait for a case with the proper facts and a party making the proper legal arguments before it can change the law in a certain area. The Board did not do that in *Specialty Healthcare*, so it should be overturned as applied outside of the non-acute hospital context.

Perhaps recognizing the breadth of its impending decision in *Specialty Healthcare*, the Board solicited briefs from the parties and amici on eight questions in advance of its opinion. *See* 356 NLRB No. 56 (2010); *cf. Manufactured Hous. Inst. v. EPA*, 467 F.3d 391, 399 (4th Cir. 2006) ("EPA's attempts to comply with APA notice-and-comment procedures suggest that the agency believed them to be applicable."). To the extent that the Board did so as some kind of effort to appear to comply with the APA, that effort failed. The APA requires,

[13] Further, neither party in *Specialty Healthcare* requested the type of broad-scale revisions the Board made. The Board's decision to do so *sua sponte* was another abuse of discretion—and demonstrates once again that its intent was to effect the kind of "stealthy" rulemaking that violates the APA. The Board would have been justified in highlighting the issue and assuming, without deciding, that the traditional standards still governed, but that is not what the Board chose to do. Instead, it issued what was essentially an advisory opinion that neither party requested.

among other things, that a notice of proposed rulemaking be published in the Federal Register and that any Rule be published 30 days prior to its effective date. 5 U.S.C. § 553. These rules apply unless the agency "for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." *Id.* § 553(b)(B); *see also id.*, § 553(d)(3). Obviously, none of the Board's actions in this case met those requirements. Thus, the Board's "overwhelming-community-of-interest" test cannot be sustained as an exercise of its rulemaking power.

For the reasons set forth above, the Board should not apply the standard announced in *Specialty Healthcare* to the determination of an appropriate unit in this case.

II. UNDER THE TRADITIONAL COMMUNITY-OF-INTEREST STANDARD—STILL APPLICABLE WHERE THE PARTIES HAVE PRIOR BARGAINING HISTORY—THE REGIONAL DIRECTOR'S DECISION LIMITING THE UNIT TO ONLY THE THREE MAINTENANCE WORKERS WAS CLEARLY INAPPROPRIATE.

The Board has created a sizable body of law on the appropriateness of maintenance-only units in manufacturing plants. Under these precedents, the Board compares production and maintenance workers across a number of factors to determine whether the maintenance workers are sufficiently distinct from the production workers to justify a separate bargaining unit. Despite the changes announced in *Specialty Healthcare*, the traditional standard still controls here in light of prior bargaining relationship between the Employer and the Union in St. Louis. Under this longstanding standard, the maintenance employees do not maintain a sufficiently distinct community of interest to warrant a separate bargaining unit. Both the Regional Director's failure to apply that standard and his factual conclusion that there was no relevant prior history constitute reversible error.

A. *Specialty Healthcare* Does Not Apply Where Parties Have Bargaining History, and the Board's Failure to Acknowledge the Prior History Was Clearly Erroneous.

The standard announced in *Specialty Healthcare* applies only in the absence of bargaining history. *See Specialty Healthcare and Rehab. Ctr. of Mobile*, 357 NLRB No. 83 (2011), slip op. at 1 (stating one of its issues for review as "*Where there is no history of collective bargaining*, should the Board hold that a unit of all employees performing the same job at a single facility is presumptively appropriate in non-acute health care facilities. Should such a unit be presumptively appropriate as a general matter.") (emphasis added); *id.* at 9 n.19 ("It is highly significant that, *except in situations where there is prior bargaining history*, the community-of-interest test focuses almost exclusively on how the employer has chosen to structure its workplace.") (emphasis added). Where there is prior bargaining history, the revised framework outlined in *Specialty Healthcare* does not apply.

The Regional Director's finding of no prior history is clearly erroneous. Purina and the Union are parties to a labor contract that covers certain employees at the Employer's General Office facility in St. Louis. (Union Ex. 1) In conjunction with two other unions, the Union represents:

> [M]aintenance mechanics, electricians, plumbers, painters, millwrights, telecommunication clerks, and laborers . . . .

(Union Ex. 1, Art. 2.1, p.3) The only employees excluded from that unit are "porters, operating engineers, drivers, office and clerical employees, and supervisors." (*Id.*)

The parties' CBA does not limit the Union's representational duties to any subgroups of the unit described in the Recognition clause of the agreement. Indeed, the recognition clause confirms that all of the unions in that CBA, including the petitioning Union here, "are hereby recognized by the Company as the exclusive representatives of all the

employees in such unit for the purpose of collective bargaining in respect to rates of pay, hours, and other conditions of employment." (*Id.*, Art. 2.2.) The Union represents not only electricians, but also other employees that are not craft workers but who are clerks or laborers. (*Id.*, Art. 2.1.) The parties' description of the work of the represented laborers confirms that these employees are not craft employees: "Assists Maintenance Mechanics and performs work not requiring the skills or tools which are utilized exclusively by Maintenance Mechanics." (*Id.*, Art. 10.10, p. 14)

Consequently, the Regional Director's conclusion that "there is insufficient evidence to demonstrate that the Petitioner has represented the Employer's non-craft employees at another facility" is clearly erroneous. The collective bargaining agreement between the Petitioner and the Employer confirms this fact on its face. That contract is in evidence, and the Union did not present any evidence to explain or contradict it.

In view of the existing bargaining relationship and history between Purina and the Union, not only is the standard announced in *Specialty Healthcare* inapplicable in this case, but it is particularly inappropriate for the Board to accept the very narrow and small unit proposed by the Union and thereby squash the right of the other hourly employees in the facility to exercise their right to decide whether or not to bring a union into the facility. Consistent with the bargaining relationship the Union already has with Purina, the Regional Director should have viewed this history as conclusive and required any unit to include the same swath of employees covered under the existing labor contract.

B. Under the Traditional Community of Interest Standard, the Union's Proposed Unit, Approved by the Regional Director, Is Too Narrow.

If not finding the prior bargaining history conclusive, the Regional Director at the very least should have applied the traditional community of interest test used on manufacturing facilities, rather than the *Specialty Healthcare* test. For a period of over fifty years, the Board

has developed standards for determining when a maintenance-only bargaining unit is appropriate when another party (usually the employer or a rival union) contends that a production-and-maintenance unit is the smallest appropriate unit. Beginning with *American Cyanamid Co.*, 131 NLRB 909 (1961), the Board has compared and contrasted the maintenance employees in the proposed unit with the production employees claimed to be necessary members of the unit to determine whether the maintenance employees have a sufficiently distinct "community of interest" justifying a bargaining unit separate from the production employees. *Id.* at 910; *see also Buckhorn, Inc.*, 343 NLRB 201, 202 (2004) ("It is the Board's longstanding policy, as set forth in *American Cyanamid* . . . , to find petitioned-for separate maintenance department units appropriate where the facts of the case demonstrate the absence of a more comprehensive bargaining history and the petitioned-for maintenance employees have a community of interest separate and distinct from other employees."). Units containing production and maintenance workers are presumptively appropriate. *Alpha Assocs.*, 344 NLRB 782, 784 (2005).

The Board has recognized that determinations under this standard are fact-intensive and determined on a case-by-case basis. Among the factors considered are "mutuality of interests in wages, hours, and other working conditions; commonality of supervision; degree of skill and common functions; frequency of contact and interchange with other employees; and functional integration." *Id.* No single factor is dispositive, and the weight to be given each factor "will vary from industry to industry and from plant to plant." *Am. Cyanamid*, 131 NLRB at 911. If, after considering all these factors (and any other factors relevant to the particular workplace), the maintenance employees are not "a distinct and homogeneous group of employees with interests separate and apart from other employees," *TDK Ferrites Corp.*, 342 NLRB 1006, 1008 (2004), the Board will not certify a maintenance-only unit.

Major distinctions between two groups of employees will justify multiple bargaining units, but modest differences between production and maintenance employees do not *ipso facto* warrant separate units. Instead, the Board must weigh the differences in the groups against the similarities. For example, the Board has held that separate supervision for maintenance employees and some variations in conditions of employment were "more than offset" by the similarities between the two groups. *Chromalloy Photographic Indus.*, 234 NLRB 1046, 1047 (1978). Likewise, the Board has held that differences in wages ($4.25 per hour for maintenance employees vs. $3.25-$3.50 per hour for production workers) and uniform colors create a "nominal community of interest" for maintenance employees that can be outweighed by the broader community of interest shared by all production and maintenance workers at the plant. *F&M Schaefer Brewing Co.*, 198 NLRB 323, 324-25 (1972).

In this case, application of the factors points decisively to requiring a unit of all hourly employees in the Support Center. All the employees are required to work with each other in a "One Team" approach, adhering to the principles and processes of NCE. All enjoy the same benefits and wage enhancements like the business-wide bonus, shift differential and overtime pay. All have the same paid-time off benefits (like vacation, holiday pay and funeral leave), and all have the same unpaid time off opportunities. All are directly or indirectly managed by Plant Manager Howdeshell. All use the same facility, subject to the same security and confidentiality procedures. All get the same employee orientation. All have their performance evaluated in the same manner. All are subject to the same Rules of Conduct, Attendance policy, Safety policy and a host of other personnel policies and procedures set forth in the employee handbook. All are required to track their work hours the same way, and all are paid the same way. Also, all perform maintenance duties.

The maintenance employees perform maintenance tasks that previously were performed entirely by the other hourly employees. Even with the addition of the maintenance employees to support the operators by relieving them of some maintenance tasks, the fact remains that the operators still perform roughly 1/3 of the planned maintenance as well as the autonomous maintenance as the need arises. Even when the maintenance employees are performing the task, they coordinate with the operator employee to learn the nature of the problem and the permissible timing for taking down the equipment. (Tr. 233) Mertzlufft testified about how he needs to communicate and coordinate with other hourly employees to learn of the maintenance needs, investigate the scope of a maintenance issue, prioritize the need for a fix, implement the fix, and conclude the maintenance work so that production can recommence. (Tr. 233-234)

Sometimes the maintenance employee and the operator employee work on the task together. Where "the maintenance employees work side-by-side with the production employees" and "maintenance employees' duties are an integral part of the production process," *TDK Ferrites*, 342 NLRB at 1008, it makes little sense to split the employees into multiple bargaining units. *See also Peterson/Puritan, Inc.*, 240 NLRB 1051, 1051 (1979) ("[A]lthough the mechanics perform essentially mechanical maintenance rather than production work, they maintain the production lines, and thus their duties are an integral part of the production process.").

The other hourly employees in the Support Center share a substantial community of interest with the maintenance employees in relation to wages, benefits and terms and conditions of employment. *See, e.g.*, *Buckhorn*, 343 NLRB at 204 ("[I]n all significant respects, all maintenance employees and production employees share identical terms and conditions of

employment, including work rules and policies, work schedules and vacations, lunch facilities, and fringe benefits."). Had the Regional Director applied this standard, he should have determined that the smallest appropriate unit was a wall-to-wall unit, or at the very least, a unit that contained all employees who were subject to the CBA between Purina and the Union in the St. Louis General Office. The failure to do so at the very least requires remand to the Regional Director to apply the correct standard in the first instance.

III. EVEN HAD *SPECIALTY HEALTHCARE* BEEN VALIDLY ADOPTED AND COULD PROPERLY BE APPLIED TO THIS CASE, THE REGIONAL DIRECTOR ERRED BY EXCLUDING THE REMAINING HOURLY EMPLOYEES.

Even if the one assumes that the *Specialty Healthcare* test applies in this case, the petitioned-for unit remains inappropriate because all the hourly employees share an overwhelming community of interest, and the Regional Director erred by concluding otherwise. As discussed above, virtually all the important categories of matters typically bargained about by unions are the same for all hourly employees in this Support Center. In light of these many similarities, any bargaining unit containing maintenance employees must also include the other hourly employees. The other employees should not be disenfranchised and prevented from exercising their right to decide and potentially vote on whether they desire to be represented by a union. The Union does not have any sufficient showing of support from any group of Support Center employees other than these few maintenance employees. The Union seeks a micro unit of only three people because it only has organized sufficient support in this small group, and that is the point—the extent of organization by the Union cannot be a dominant factor in the Board's analysis of a proper unit. *See* NLRA § 9(c)(5), 29 U.S.C. § 159(c)(5).

Even if the Board applies the *Specialty Healthcare* test, and even if it rejects the Employer's position that the smallest appropriate unit consists of all the hourly employees in the

Support Center, at the very least the Board should conclude that the smallest appropriate unit includes with the maintenance employees the machinists, assembler and painter employees because those employees' job descriptions confirm unequivocally that the performance of maintenance tasks is a required part of their job. (Emp. Exs. 8, 9 and 13) These employees in particular share an overwhelming community of interest with the maintenance employees because they each perform maintenance work and each share common interest in all the other terms and conditions of employment discussed earlier in this brief. The Regional Director's decision rejecting this alternative requires remand.

CONCLUSION

For the reasons set forth above, Purina respectfully requests that the Board grant review of and reverse the Regional Director's Decision and Direction of Election.

Dated: March 9, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND FILING

Pursuant to Section 102.114(i) of National Labor Relations Board Rules and Regulations, the foregoing document was served via email on March 9, 2015 to:

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Pursuant to Section 102.67(k)(2) a copy of this brief was filed with the Regional Office via electronic filing at www.nlrb.gov.

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